

The Western Pennsylvania School for the Deaf and Federation of Teachers Organizing Committee (PaFT, AFL-CIO) and Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board. Case AO-235

June 16, 1982

ADVISORY OPINION

On January 29, 1982, The Western Pennsylvania School for the Deaf, herein called the Employer, filed a petition pursuant to Sections 102.98 and 102.99 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, for an advisory opinion on whether the Board would assert jurisdiction over its operations with respect to a representation petition pending before the Commonwealth of Pennsylvania Labor Relations Board, herein called the PLRB. The Western Pennsylvania School for the Deaf Federation of Teachers Organizing Committee (PaFT, AFL-CIO), herein called the Union, filed a petition for advisory opinion on February 3, 1982, which raises essentially the same issues as the Employer's petition. On the same date, the PLRB filed a motion to intervene in this proceeding and on February 17, 1982, the Employer filed a brief in support of its petition.

In pertinent part, the petitions, brief, and motion allege as follows:

There is pending before the Commonwealth Court of Pennsylvania an appeal from a decision of the Court of Common Pleas of Allegheny County, Pennsylvania, affirming a finding of the PLRB that the Employer is a public employer within the meaning of applicable statutes of the Commonwealth of Pennsylvania and, therefore, subject to the jurisdiction of the PLRB rather than the National Labor Relations Board, herein called the Board. The Commonwealth Court was not persuaded that the Employer is a "state or political subdivision thereof" expressly excluded from the jurisdiction of the Board by Section 2(2) of the National Labor Relations Act, the statute administered by the Board. It noted that the Board abandoned the "intimate connection" test in *National Transportation Service, Inc.*, 240 NLRB 565 (1979), for determining whether to assert jurisdiction over an entity with close ties to an entity exempt from the Board's jurisdiction pursuant to Section 2(2) and adopted the "right to control" test pursuant to which the Board will assert jurisdiction over such an employer if the employer has sufficient control over the employment conditions of its employees to bargain with a labor organization as their representative. The court expressed doubt as to whether the Board applying the "right to control" test

would assert jurisdiction over the Employer and directed the parties to petition the Board for an advisory opinion on whether the Board would assert jurisdiction on the basis of its current standards.

The Employer is a nonprofit educational institution which provides educational services for hearing-impaired children. It enrolls approximately 430 students, all of whom are referred by the public school districts of western Pennsylvania. Its gross income for fiscal year "1980-1981" was \$5,715,000 of which approximately 76 percent was derived from state sources, 7 percent from Federal Government sources, 16 percent from endowment income and contributions, and 1 percent from miscellaneous sources. It appears to be administered by a private, self-perpetuating board of directors and apparently has no power of eminent domain, subpoena, or taxation.

The Employer contends that the current record is inadequate for the Board to decide whether to assert jurisdiction over its operations and proposes that the Board conduct an evidentiary hearing to develop the issues since the record developed in the state proceedings was developed prior to the Board's decision in *National Transportation, supra*, abandoning the "intimate connection" test and adopting the "right to control" test for determining whether to assert jurisdiction over entities with close ties to entities exempt from Board jurisdiction under Section 2(2) of the Act. The Union and the PLRB maintain that because of the relationship between the Employer and the Commonwealth of Pennsylvania the PLRB has properly asserted jurisdiction. The PLRB further contends that the Employer is an instrumentality of the Commonwealth of Pennsylvania and that, consequently, the Employer is exempt from the Board's jurisdiction under Section 2(2) of the Act under either the intimate connection test or the "right to control test." The PLRB contends, in addition, that, assuming the Board may assert jurisdiction over the Employer, state governmental controls and regulations warrant the declining of such jurisdiction pursuant to the "right to control" test. Thus, the PLRB maintains that an evidentiary hearing may be necessary on the issue of state control over the Employer's "personnel matters."

On the basis of the above, the Board is of the opinion that:

The Board's advisory opinion proceedings are designed primarily to determine questions as to the applicability of the Board's discretionary jurisdictional standards to an employer's "commerce" op-

erations.¹ The submissions by the Employer, the Union, and the PLRB, including the precedents cited by them, basically raise the issue as to whether the Employer, because of its relationship with the Commonwealth of Pennsylvania, shares Penn-

¹ See *Massachusetts Labor Relations Commission (Baystate Bus Corporation)*, 236 NLRB 1357 (1978); *Follett Corporation*, 223 NLRB 800 (1976); *Pennsylvania Labor Relations Board (George Junior Republic)*, 215 NLRB 323 (1974); *Globe Security Systems, Inc.*, 209 35 NLRB (1974); and *Robert C. Coleman, Johnny Cox, Rodney Gregorio, Sam Law, James H. Victor and Frank Wilson*, 180 NLRB 529 (1969).

sylvania's exemption under Section 2(2) of the Act, thereby precluding the Board from asserting jurisdiction over the Employer. This issue does not fall within the intent of the Board's advisory opinion rules.² We shall, therefore, dismiss the petitions.

Accordingly, it is hereby ordered that, for the reasons set forth above, the petitions for advisory opinion herein be, and they hereby are, dismissed.

² *Ibid.*